

**LEE YOON CHOY & ORS.
v. PUBLIC PROSECUTOR**

[C. A. (Willan C.J., Spenser Wilkinson and Russell JJ.)
December 24, 1948]

[K. L. — F. M. Criminal Appeal No. 142 of 1948]

*Penal Code, s. 34 — Emergency Regulations, 1948,
regs. 4 and 5 — Common Intention — Joint possession
of firearms.*

In this case the three appellants were convicted on three charges (a) possession of a revolver without being licensed, (b) possession of ammunition without authority, and (c) possession of explosives without authority. The facts were that a Police and Military party acting on information received raided a hollow in a cliff north of Ipoh consisting of an outer and an inner cave. On the first day the combined party found the explosives, the subject of the third charge, in the outer cave. The party was fired on and handgrenades were thrown at them. On the second day the three appellants were driven out of the inner cave with the aid of tear gas. The appellants were searched and on the first appellant was found the revolver and ammunition, the subjects of the first and second charges respectively. No firearms or ammunition were found on the second or third appellants. At the trial Federal Counsel for the prosecution admitted that to establish possession against the second and third appellants, he must prove common intention and submitted in effect that there was unity of criminal behaviour among all the three appellants in furtherance of a common intention of resisting the combined party. No reference was made at the trial to section 34 of the Penal Code.

Held: (1) the law of common intention in this country is defined in section 34 of the Penal Code and under the terms of that section, there must exist a common intention to commit the crime actually committed and it is not sufficient that there should be merely a common intention to behave criminally; (2) there was no evidence in this case of any common intention to possess the arms or ammunition and therefore the conviction of the second and third appellants for possession of the arms and ammunition must be set aside; (3) the second and third appellants should have been convicted under Regulation 5 of the Emergency Regulations, 1948 for consorting with a person who is carrying or has in his possession arms or ammunition; (4) there was insufficient evidence to show that the three appellants or any of them had actual or potential physical control over the explosives, the subject of the third charge, and the intention to exercise such control and therefore the conviction of the appellants on the third charge must be quashed.

Cases referred to:—

- (1) *Reg. v. Thompson* 11 Cox 362.
- (2) *Thisgaraja Bhagavathar v. King-Emperor* L.R. 74 I.A. 132.
- (3) *Rex v. Banka* (1936) S.S.L.R. 16; (1936) M.L.J. 66.
- (4) *Mahbub v. King-Emperor* L.R. 72 I.A. 148.

CRIMINAL APPEAL.

P. P. Nair for first appellant.

T. K. Sen for second and third appellants.

A. M. I. Austin (D. P. P.) for the respondent.

The judgment of the Court of Appeal was delivered by:—

Willan C.J. :—In this case the three appellants were charged as follows:—

1. That you on or about the 23rd and 24th September, 1948, at Gunong Tunggul, Ipoh, in the State of Perak, did jointly have possession of a firearm, to wit, a .32 Colt revolver No. 378118 not being a firearm which you are licensed to possess under any other written law for the time being in force, and thereby committed an offence punishable under Regulation 4(1)(a) of the Emergency Regulations, 1948.

2. That you on or about the 23rd and 24th September, 1948, at Gunong Tunggul, Ipoh, in the State of Perak, did jointly have possession of ammunition, to wit, 2 hand-grenades, 16 rounds .30 carbine and 17 rounds .7.65 mm. ammunition without lawful authority therefor, and thereby committed an offence punishable under Regulation 4(1)(b) of the Emergency Regulations, 1948.

3. That you on or about the 23rd and 24th September, 1948, at Gunong Tunggul, Ipoh, in the State of Perak, did jointly have possession of a quantity of explosive known as Exodite contained in 6 hand-grenades without lawful authority therefor, and thereby committed an offence punishable under Regulation 4(1)(b) of the Emergency Regulations, 1948.

An alternative charge was preferred against the second and third appellants, under Regulation 5 of the said Regulations, of consorting with the first appellant, when carrying a firearm and ammunition.

All three appellants were convicted on the 1st, 2nd and 3rd charges, and each of them sentenced to death.

It is necessary to set out the facts in some detail before dealing with the law applicable to this case.

On the early morning of the 23rd September, 1948, acting on information received, a party of police and military, hereinafter in this judgment referred to as "the combined party" carried out operations about 3 miles north of Ipoh, the objective being a hollow in a cliff consisting of an outer and an inner cave.

On entering the outer cave the combined party at first met no opposition, but when they arrived near a crater in the outer cave a hand-grenade, which exploded, was thrown at them by an unknown and unseen assailant. The combined party opened fire—their shots were directed at the ceiling of the cave in the hope that by means of ricochets their assailants, whose numerical strength was unknown, might be disabled. The combined party also used grenades with the same object. They called on the assailants to surrender. This engagement continued for about 20 minutes with no result, and thereupon the combined party withdrew and sent for reinforcements. At about mid-day on the 23rd September, 1948, the combined party, reinforced, entered the mouth of the inner cave.

Again they were fired on and another hand-grenade thrown at them. The combined party again withdrew and eventually the next day i.e. the 24th September 1948 the unknown occupants of the inner cave were driven out with the aid of tear gas. There emerged from that inner cave :—

- (a) the first appellant, who had in his possession the revolver specified in the 1st charge and the 33 rounds of ammunition specified in the 2nd charge;
- (b) the second and third appellants, on whom no fire-arms or ammunition were found.

After their arrest all three appellants made statements to the police under Regulation 33 of the Emergency Regulations 1948. These statements were put in evidence at the trial.

The first appellant in his statement admitted possession of the revolver; he admitted firing it; and he admitted throwing the hand-grenade. He said that the second and third appellants had no fire-arms but was not sure whether they had any hand-grenades.

At the trial the first appellant made a statement from the dock in which he frankly admitted possession of the revolver, ammunition and two hand-grenades, the subject matter of the 1st and 2nd charges.

The second appellant in his statement said that he had gone into the cave to escape the police. He stated that it was the first appellant who had possession of the revolver, ammunition and two hand-grenades, the subject matter of the 1st and 2nd charges, and that neither he nor the third appellant had possession of any fire-arms or ammunition.

The third appellant in his statement said that he had been forced by bandits to enter the inner cave. He corroborated the statement of the second appellant that it was the first appellant alone who had possession of the revolver, ammunition and the two hand-grenades, the subject matter of the 1st and 2nd charges.

The second appellant gave evidence at the trial but the third appellant elected to say nothing.

As regards the six hand-grenades, the subject matter of the 3rd charge, they were found by one of the combined party on the first day of the operation i.e. the 23rd September, 1948. A study of the evidence leads to the conclusion that those hand-grenades must have been found in the outer cave.

On the evidence the first appellant is clearly guilty on the 1st and 2nd charges.

Accordingly his appeal in respect of both these charges is dismissed.

With regard to the second and third appellants in respect of these two charges, Federal Counsel for the prosecution at the trial admitted that to establish possession against them, jointly with the first appellant, of the subject matter of those two charges, he must prove common intention. He submitted this had been proved by the following facts :—

- (a) After the combined party arrived at their objective no one had gone into, or departed from, the cave and therefore the three appellants were the only occupants of the cave.
- (b) The resistance to the combined party was common to all three appellants.
- (c) All three appellants refused to surrender to the combined party.

In support of his argument Federal Counsel cited the English case of *Reg. v. Thompson*⁽¹⁾ which decided that where several persons are found out together at night for the common purpose of housebreaking, and only one is in possession of the housebreaking implements, all may be found guilty of being found in possession of implements of housebreaking without lawful excuse, because the possession by one is in such a case the possession by all.

This Court, on more than one occasion, has mentioned the danger of relying on English or Indian cases as authority in this country without first establishing that the relevant English or Indian law, as the case may be, is *in pari materia* with the local law. If authority is needed for this, it is to be found in the case of *Thisgaraja Bhagavathar v. King-Emperor*⁽²⁾ where their Lordships of the Privy Council said :—

It is always dangerous to construe an Indian Act by reference to an English Act however closely the language of the two Acts may approximate.

The law as to common intention in this country is defined in section 34 of the Penal Code, which reads :—

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Therefore it is to that section we must look and not to English cases decided on English Common Law. This is clearly laid down in the case of *Rex v. Banka*⁽³⁾. That case was decided by the Court of Criminal Appeal of the Straits Settlements. That Court was considering this very question of "common intention", and Huggard C.J., in delivering the judgment of the Court, said :—

In the course of the arguments on this appeal this Court was referred to a number of English cases where the question of 'common intent' or 'common design' has been considered.

(Here follows a list of the English cases to which reference had been made).

In considering these English cases, however, it is necessary to remember that there is a very important difference between the law as enacted in section 34 of our Penal Code and the Common Law of England as to the evidence necessary to establish a common intention. Under our Code it is essential that there should be evidence of a common intention, or evidence from which such common intention can properly be inferred, to commit the act actually committed.

Again, at page 27, the learned Chief Justice said :—

Under the terms of that section “i.e. section 34” as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to ‘behave criminally’.

We respectfully agree that judgment lays down the correct construction of section 34 of the Penal Code, and are fortified in this view by the case of *Mahbub v. King-Emperor*⁽⁴⁾ where, their Lordships of the Privy Council said :—

To invoke the aid of section 34 successfully, it must be shown that *the criminal act complained against* was done by one of the accused in the furtherance of the common intention of all.

In this case the criminal act complained against in the 1st and 2nd charges was the possession of a revolver, ammunition and two hand-grenades — nothing more.

The error into which the learned trial Judge, Federal Counsel at the trial and Federal Counsel at the hearing of this appeal fell into is that they decided there was unity of criminal behaviour among all three appellants in the furtherance of a common intention of resisting the combined party. But that is an entirely different thing from considering the question of common intention to possess the revolver, ammunition and two hand-grenades, all of which were found in the exclusive possession of the 1st appellant. To put the matter concisely — the question at the trial was not whether there was a common intention to be bandits, but whether there was a common intention to possess the revolver, ammunition and the two hand-grenades.

Bearing in mind the true construction of section 34 of the Penal Code, and reviewing the evidence, particularly the statements of the three appellants which were put in evidence by the prosecution, we cannot see that any such common intention to possess was ever proved against the second and third appellants.

We do not wish to be taken as deciding that there can never be the common intention to possess fire-arms and ammunition or that there can never be joint

possession of fire-arms or ammunition, but we decide that this was not so in this case.

We would add that if the three appellants had been charged with attempted murder, as they could have been, and, upon a proper direction to the Assessors in respect of section 34, had been convicted on such a charge, we would not have been disposed to interfere with such a conviction.

In our view the second and third appellants should have been convicted on the alternative charge under Regulation 5 of the Emergency Regulations, 1948 That Regulation reads :—

Any person who consorts with or is found in the company of another person who is carrying or has in his possession arms or explosives in contravention of Regulation 4 of these Regulations, in circumstances which raise a reasonable presumption that he intends to or is about to act with, or has recently acted with, such other person in a manner prejudicial to public safety or the maintenance of public order, shall be guilty of an offence against these Regulations and shall be liable to imprisonment of either description for a term not exceeding ten years.

That Regulation aptly fits the position of the second and third appellants in this case. It expressly deals with the state of affairs where unarmed persons are found in the company of armed persons. In our opinion the Legislature, in promulgating Regulation 5, which imposes a maximum penalty of ten years rigorous imprisonment, cannot have intended that unarmed persons found in the company of armed persons should still be liable to prosecution under Regulation 4 which imposes the death penalty. Otherwise it would mean that unarmed persons could be condemned to death for merely being in the company of armed bandits and, as just stated, this appears to us to be the exact negation of the intention of the Legislature.

For these reasons the appeals of the second and third appellants in respect of their convictions on the 1st and 2nd charges are allowed and their convictions and sentences quashed. We substitute therefor a conviction on the alternative charge under Regulation 5 of the Emergency Regulations, 1948, and sentence each of them to the maximum penalty under that Regulation i.e. ten years rigorous imprisonment each, to date from the 24th of November, 1948, the date of their original convictions.

This leaves outstanding the conviction of all three appellants on the 3rd charge i.e. joint possession of a quantity of explosive known as Exodite contained in six hand-grenades.

As we have already stated, these were found on a shelf in the *outer* cave, and were found by one of the combined party. This finding is the only evidence regarding this explosive.

It is uncertain from the evidence how long the appellants had been in the inner cave. The first appellant, in his statement to the police, said he had been there for three days, and that when he arrived the other two appellants were already there. The second and third appellants in their statements to the police only admitted having been there for one night.

But it must be remembered that the subject matter of the 3rd charge was found in the *outer* cave. In order to establish possession thereof in the three appellants the prosecution must prove:—

- (a) that they had actual or potential physical control over this explosive, and
- (b) the intention to exercise such control.

In our view the very meagre evidence led by the prosecution on this point fell far short of proving both (a) and (b).

Accordingly the appeals of all three appellants against their convictions on the 3rd charge must be allowed and their convictions and sentences in respect of that charge quashed.

The final result is that the first appellant's convictions on the 1st and 2nd charges and the sentence of death resulting therefrom stand, and the second and third appellants are convicted under Regulation 5 of the Emergency Regulations, 1948, and each of them sentenced to ten years rigorous imprisonment, to date from the 24th of November, 1948.

Order accordingly.

KONG WAI & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Willan C.J., Spenser Wilkinson and Russell JJ.)
December 24, 1948]

[K. L. — F. M. Criminal Appeal No. 146 of 1948]

Penal Code, s. 34 — Emergency Regulations, 1948, reg. 4 — Charge of joint possession of firearm — Common Intention — Direction.

In this case the two appellants and a third person were charged with being jointly in possession of firearms. The two appellants were convicted. In the course of his summing up the learned trial Judge said "If you apply your minds to the first charge, that is that the three prisoners were jointly in possession of these firearms, I have to tell you that it is the law that if a number of people set out with a common purpose which involves the use of firearms, if in the course of carrying

out that purpose with these firearms, some of them have physical possession of firearms, that is—have firearms in their hands, and in the course of what is done they are used, then everyone—in that party who is there with the common intention of acting with the rest of the party is jointly in possession of the firearms which are in fact used."

Held: (1) the above direction does not set out accurately the law of common intention in this country; (2) the law of common intention in this country is laid down in s. 34 of the Penal Code and as there was no evidence in the present case from which a common intention to possess arms could reasonably be inferred, the conviction of the appellants must be quashed.

Semle: The use of the expression "joint possession" in connection with an offence such as possession of arms under Regulation 4 of the Emergency Regulations tends to obscure the necessity, in cases where more persons than one are joined in one charge, of proving, as against each of them that he was in fact in possession thereof.

Case referred to:—

- (1) *Lee Yoon Choy v. Public Prosecutor ante*
p. 167.

CRIMINAL APPEAL.

R. P. S. Rajasooria for the appellants.

F. G. Cooke (D. P. P.) for the respondent.

The judgment of the Court of Appeal was delivered by:—

Spenser Wilkinson J. :—The appellants were two of three accused charged with being jointly in possession of firearms. There was also an alternative charge against each of three of being in possession of the component parts of a firearm. In regard to the 2nd accused at the trial the learned trial Judge did not agree with the opinion of the Assessors and ordered a re-trial. The appellants, who were the 1st and 3rd accused at the trial, were both convicted on the main charge of joint possession and condemned to death. Against these convictions and sentences they appealed.

The charges arose out of an ambush by bandits of a motor car in which Mr. Clark, the dredge engineer at Tronoh Mines was travelling together with a driver and one Special Constable, at about 7.00 a.m. on the 28th July, 1948. The car, whilst being driven along the road towards the dredge, was subjected to a fusillade of rifle and automatic weapon fire. Although 19 shots hit the car and the driver was wounded the car was able to proceed and there were no other casualties.

After shooting at the car the bandits, who appear to have numbered about 20 or more and were armed with rifles and sten guns, proceeded a short distance across country to a row of bungalows and proceeded